

WRITTEN REBUTTAL TESTIMONY OF DAVID ALFARO

1. Introduction and Summary of Conclusions

My name is David Alfaro and I am a Managing Director in the FTI Technology Practice. I have worked for approximately fifteen years in the areas of information acquisition, management, and analysis. As a Managing Director in technology, my focus is on recovering, inventorying and analyzing current and historic records, converting and synthesizing disparate electronic data forms, and implementing statistical sampling when necessary. On a regular basis, I work with programming languages and software, including STATA, the program utilized by Dr. Landes to prepare his written direct testimony. I have testified in the past about the analysis of contractual, financial and accounting data, including declaratory and oral testimony to the SEC and presentation testimony before a court-appointed special master. I have also given numerous depositions and participated in many other cases which settled before I could testify. I hold a B.A. in Legal Studies and a B.S. in Business Administration from the University of California at Berkeley.

I was engaged by the Recording Industry Association of America to evaluate The Harry Fox Agency data ("HFA data") that was relied upon in part by William Landes in formulating the opinions he expresses in his Amended Expert Report (Landes WDT, CO Trial Ex. 22). Having reviewed the HFA data and the STATA code employed by Dr. Landes and his staff, I have made the following observations:

(1) I observed substantial gaps in the license number sequencing maintained by HFA, suggesting that there may be a substantial amount of data missing from Dr. Landes's data pool.

(2) Dr. Landes excluded millions of licenses from his analysis -- in fact, he excluded more licenses than he included. The licenses he excluded include:

- 5,192 licenses for which no configuration code exists in the database.
- More than 4 million licenses classified as "Other Digital."
- 99,000 licenses labeled "controlled."
- More than 700,000 licenses labeled "negotiated" or "reduced."

(3) If one redoes Dr. Landes's analysis of discounting of royalties for physical products but includes either the controlled licenses or the negotiated and reduced licenses, one finds that the rate of discounting has actually been increasing in recent years rather than decreasing as Dr. Landes reported.

(4) Dr. Landes made no adjustments for any changes in HFA's market share over the period 1996-2005. If HFA's market share changed over that period, his results showing a decline in licenses issued below the statutory rate could simply reflect the shift in market share rather than a change in rate negotiations.

2. Background: Dr. Landes's Reliance on the HFA Data

Dr. Landes relies upon the HFA data for numerous of his conclusions, both in his written testimony and his oral testimony in the direct phase of this proceeding. Based on the assumptions and criteria employed during his execution of the STATA code, Dr. Landes concludes that the number of licenses issued at the statutory rate for both digital and physical configurations has increased over time, and that the vast majority of recently issued licenses were issued at or near the statutory rate. Dr. Landes also concludes that the average rate for both digital and physical configurations has been increasing over time.

In his written testimony, Dr. Landes relies upon these purported trends in the HFA data to argue that the current mechanical royalty rate for CDs is too low. (Landes WDT at 28-32). He also relies upon the HFA data to argue for a higher statutory rate for digital phonorecord deliveries ("DPDs") because he argues that the data show "virtually no negotiation" of the royalty rates for DPDs. (Landes WDT at 38, 39). In addition, Dr. Landes relies upon the HFA data in the Figures appended to his written testimony that portray a trend towards fewer licenses issued below the statutory rate over the time period 1996-2005. (Landes WDT at Figures 4, 5, 6, 7).

Dr. Landes also testified at trial about his reliance on the HFA data. (2/7/08, Tr. at 2131-2161).

3. Methodology

I reviewed the Amended Written Direct Testimony of Professor Landes, as well as the transcript of his deposition and his testimony at trial. I also reviewed the trial testimony of Irwin Robinson, David Israelite, Andrea Finkelstein, Rick Carnes, and Victoria Shaw.

Next I set out to analyze the data that Dr. Landes relied upon in his testimony. I did so by evaluating the data produced by the Copyright Owners in discovery in this proceeding and the STATA code used by Dr. Landes to reach certain conclusions from the data.

In analyzing the data, I sought to determine whether gaps existed in the sequencing of license numbers issued. Typically, the primary key for a dataset is a sequential number that uniquely identifies a particular record. Accordingly, subsequent records added are assigned a primary key that is likely to be incremented by one unit, thereby ensuring that the integrity of the primary key for each record in the table remains intact. Gaps in the sequencing tend to signify an incomplete data set.

In analyzing the STATA code used by Dr. Landes, I set out to evaluate how Dr. Landes culled over 100 million licensing and distribution records down to a much smaller pool of what he represented to be the non-controlled mechanical licenses issued by The Harry Fox Agency during the period between and including 1996 through 2005. Dr. Landes and his staff reached this limited data set by performing analyses using STATA programs in order to calculate summary statistics supporting certain opinions in his Report.

STATA is a data analysis and statistical software application developed by STATA Corp. The name STATA literally comes from combining "Statistics" and "Data." The STATA program is commonly used in research fields such as economics to assist in data management and statistical analysis. The user can write commands which allow him or her to analyze the data to his or her specifications.

I was provided with the STATA programs that Dr. Landes used in his analysis of the HFA data.¹ In order to determine the impact of each STATA procedure on Dr. Landes's conclusions, I imported the HFA data into a SQL Server database and then converted the STATA code into SQL statements. I was able to execute the SQL statements as a means to recreate the Landes results and preserve the substance and sequence of his logic. In doing so, I was able to quantify and profile the impact of each of Dr. Landes's assumptions as documented in the code within the STATA programs.

I also identified and documented the embedded assumptions in Dr. Landes's STATA code relating to the inclusion and exclusion of certain HFA data records that resulted in his substantially narrower dataset. I set out to determine whether, if employed differently, Dr. Landes's STATA code would substantially affect his analysis and conclusions. I also reviewed the HFA data for information that was not considered by Dr. Landes, but may be relevant to the Copyright Royalty Judges' rate adjustment proceeding. In the course of evaluating the HFA data and Dr. Landes's analysis thereof, my colleagues and I considered over 100 million HFA licensing and distribution records in addition to hundreds of lines of complex STATA code.

4. Observations

A. There Is a High Likelihood of Missing Data from HFA's Database

I observed that in the HFA dataset, each issued license is represented by both a *unique* and a *whole number*, fitting the description of a primary key. Therefore, using the license as the primary key, I observed numerous substantial gaps in the sequence of numbering of the records in the database. Although I cannot say with certainty that gaps in the license number sequencing are caused by missing HFA data, it is consistent with what would be expected if data were missing.

¹ Specifically, I received and evaluated three proprietary STATA file types purported to have been created and used by Dr. Landes: the *input file* (which is the STATA data file ending in ".dta"); the *program file* that acts upon the *input file* (which is a text file containing a list of STATA commands ending in ".do"); and the *dictionary file* (which is the STATA file that describes the format of the *input file*).

B. Dr. Landes Excluded More Licenses from His Analysis Than He Included

(1) Dr. Landes Systematically Excluded Over 5,000 Licenses for Lack of a Configuration Code

Dr. Landes used STATA commands to evaluate the license information provided by HFA. Based on the documents and native files produced by the Copyright Owners, it appears that HFA provided Dr. Landes with two primary tables: one containing issued licenses and the other containing the configuration codes associated with those licenses. Configuration codes are generally two letters that signify the format in which a song is released and sold. Examples of configuration codes include "CD," "LP," and "SL," which respectively stand for "Compact Disc (Album)," "12 inch Vinyl (Album)," and "Single." A total of 49 different configuration codes appear in the HFA data. I received in discovery a list of 56 select configuration codes and their definitions, which is attached as **Appendix A**.

The number of licenses and configurations listed in the two tables provided by HFA is depicted below in **Figure 1**. A license can have more than one corresponding configuration because it is my understanding that when parties negotiate licenses, they may negotiate for numerous formats at once in the interest of efficiency. Accordingly, the configuration table includes more records than the license table.

Figure 1

Table	Records
Licenses	7,875,781
Configurations	8,835,792

The first procedural step in Dr. Landes's STATA code is to eliminate all licenses that do not have a configuration listed in the license configuration table. I depict the number of licenses with and without a configuration code below in **Figure 2**.

Figure 2

License Table	Licenses	%
Identified with a Configuration	7,870,589	99.93%
Identified without a Configuration (Excluded)	5,192	0.07%
Total Licenses	7,875,781	100%

Dr. Landes thus excluded over five thousand licenses (5,192) because HFA failed to identify a configuration code for them.

The total number of licenses issued each year is listed below in **Figure 3**.² The 5,192 excluded licenses are depicted below in **Figure 4**.

² Figure 3 shows a growth in the number of licenses issued over time, but this does not necessarily equate to an increase in the number of songs being licensed or recorded over time. Rather, it is most likely the result of an increase in licenses to digital services as they have become more prevalent and diverse.

Figure 3: Licenses Issued Per Year

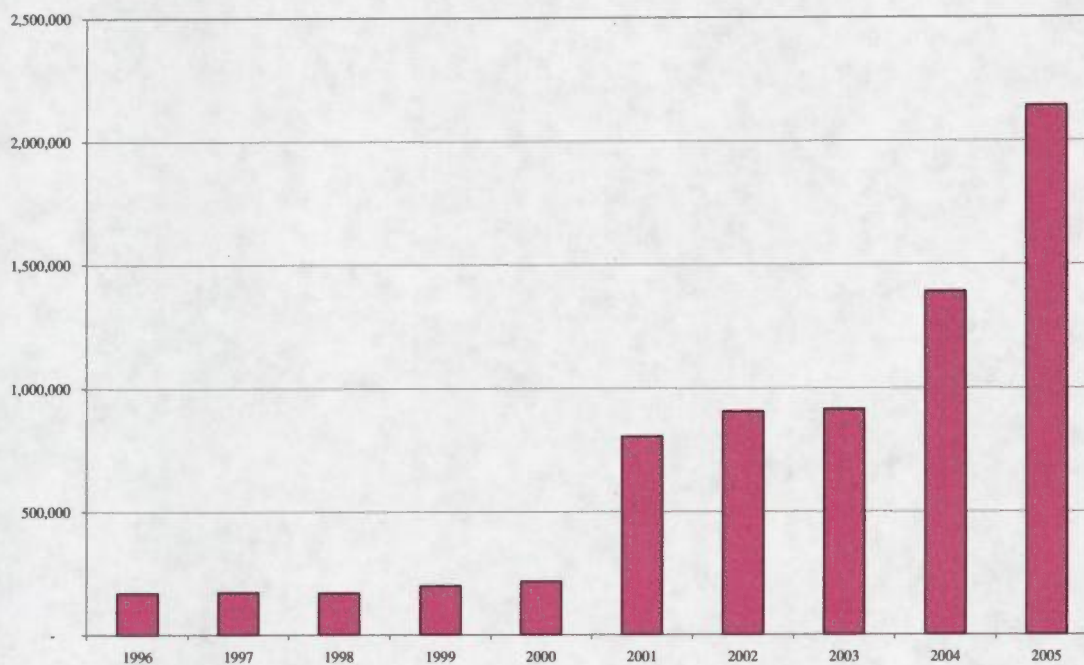
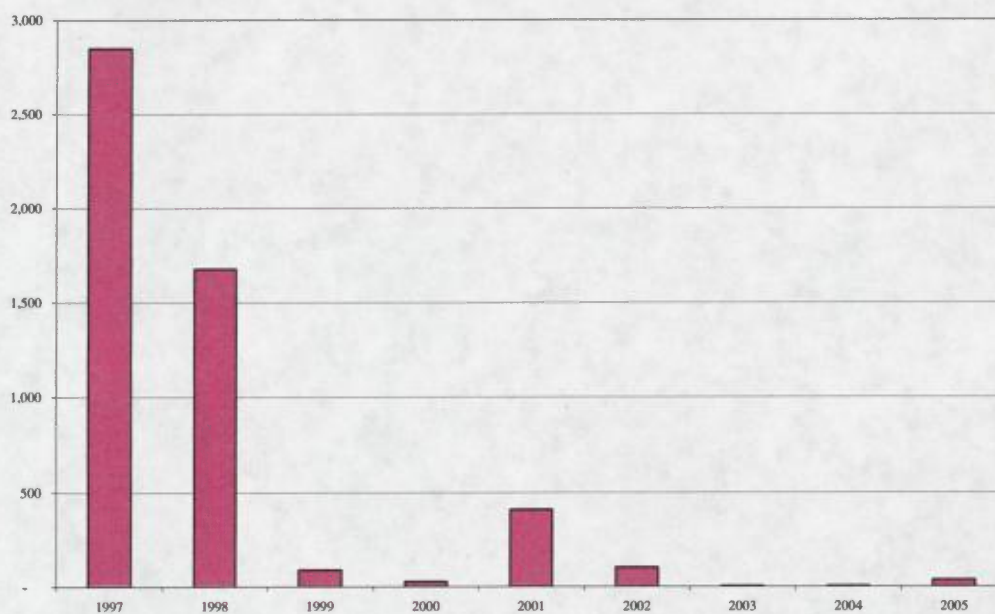


Figure 4: Missing License Configurations



Of the 5,192 licenses excluded for lack of a configuration code, most were licenses that had rates that were discounted below the statutory rate. In the license table, the HFA data lists information about the rate at which each license was issued. This information includes percentages, dollar amounts, and text descriptions such as “Negotiated,” “Statutory,” and “Other Non-Stat.” The rate information for the 5,192 licenses Dr. Landes excluded for lack of a configuration code is depicted in **Appendix B**, which is

appended to my testimony. That rate information shows that of the 5,192 licenses Dr. Landes excluded for lack of a configuration code, over 4,201 were licenses with a rate of "Negotiated", "Reduced", or some percentage of the statutory rate.

(2) Dr. Landes Excluded an Additional 4 Million Licenses by Categorizing Them as "Other Digital" Licenses

After excluding licenses without a configuration code, the next procedural step in Dr. Landes's STATA code was to combine the license and configuration tables in order to classify each license as *full digital*, *other digital*, or *physical*.

As noted earlier, licenses can be issued for more than one configuration, which can include configurations that meet all three classifications. In order to determine the classification for licenses with multiple configurations, Dr. Landes established an order of precedence which includes the following hierarchical business rules:

- If at least one configuration indicates a DPD related to a single or album – the license is classified as full digital
- From the remaining license pool, if at least one configuration indicates "Covered Services" or "Digital Preload Singles" – the license is classified as other digital
- All remaining licenses regardless of configuration are considered physical

One consequence of Dr. Landes's STATA program was that he systematically excluded all licenses categorized as *other digital* from further consideration. In full, over 4 million licenses with a configuration code of CV (Covered Services), PL (Digital Pre-Load Single), and PU (Digital Pre-Load Single Unlock), were excluded by Dr. Landes on the basis of being classified as "Other Digital."

Dr. Landes's configuration code mapping thus resulted in the exclusion of these 4 million records in addition to the more than 5,000 records already excluded for lack of a configuration code. These exclusions are depicted below in **Figure 5**.

Figure 5

Category	Licenses	%
Physical and Digital	3,813,992	48.43%
Excluded - No Configuration Code	5,192	0.07%
Excluded - Configuration is Categorized as "Other Digital"	4,056,597	51.51%
Total Licenses	7,875,781	100.00%

(3) Dr. Landes Excluded All Licenses Labeled "Controlled"

After excluding the various categories of licenses described above -- licenses lacking configuration codes, and licenses that Dr. Landes classified as "Other Digital" -- Dr. Landes then utilized various other pieces of information stored in the license table to further cull licenses from consideration. The following hierarchical business rules were applied in the STATA code to exclude additional records:

Exclude if...

- Rate Type = "Controlled"
- Rate Type = "CV TBD"
- Issue Date > December 31, 2005³

Dr. Landes excluded all licenses labeled "controlled," presumably based on the assumption that they represented licenses subject to controlled composition clauses. His analysis was deliberately focused on non-controlled licenses. There are over 99,000 licenses and over 190,000 associated configurations categorized as controlled in the database – all of which were excluded by Dr. Landes.⁴ The vast majority were licenses he would have categorized as physical products. The configurations for the 99,000 controlled licenses that Dr. Landes excluded are depicted by their configuration description and by year in **Appendix C**.⁵

Had controlled licenses not been excluded, all else being equal, Dr. Landes would have had over 68,000 additional licenses in his combined final physical and digital datasets.⁶

Adding back only the excluded controlled licenses would have altered Dr. Landes's conclusions about the number of licenses issued below the statutory rate. In fact, Dr. Landes would have observed a trend toward a *rising* number of licenses issued below the statutory rate since 2003. This trend is depicted in **Figure 6** below. To arrive at these figures, I followed the same procedures employed by Dr. Landes with the sole difference being the inclusion of controlled composition licenses.

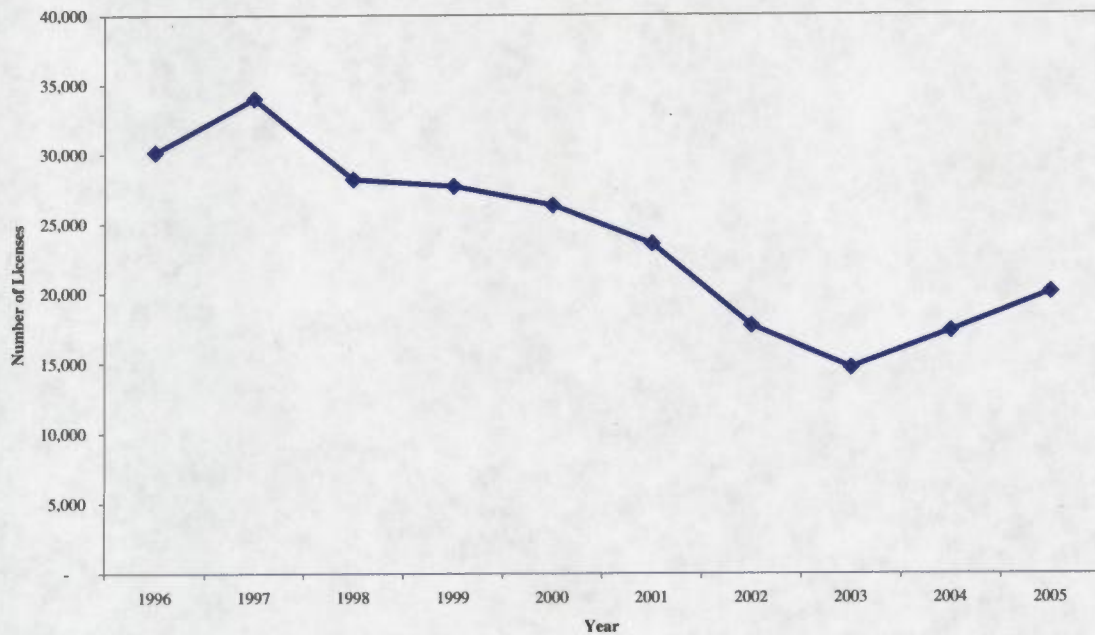
³ Based on the HFA data produced to FTI, it appears that there is data available through July 2006. Anything more recent than December 31, 2005 was excluded by Dr. Landes.

⁴ Although this is a substantial number of licenses to have excluded, the number of licenses that Dr. Landes labeled controlled is surprisingly small relative to the total number of licenses in the database, considering the testimony of Andrea Finkelstein, Irwin Robinson, and Rick Carnes that a majority of licenses are issued pursuant to controlled composition clauses. See 2/14/08 Tr. 3331:4-3332:11 (Finkelstein, A.); 1/31/08 Tr. 1010:18-21 (Robinson) (testifying that controlled composition clauses are increasingly "prevalent and complex"); 1/28/08 Tr. 221:21-222:15 (Carnes) (testifying that "[e]very record label had controlled composition clauses and when we shopped around to other labels, they all had the same thing" and that record companies "try to impose [controlled composition clauses] on practically everyone.").

⁵ There are approximately two configurations per license accounting for the 190,254 configurations in Appendix C.

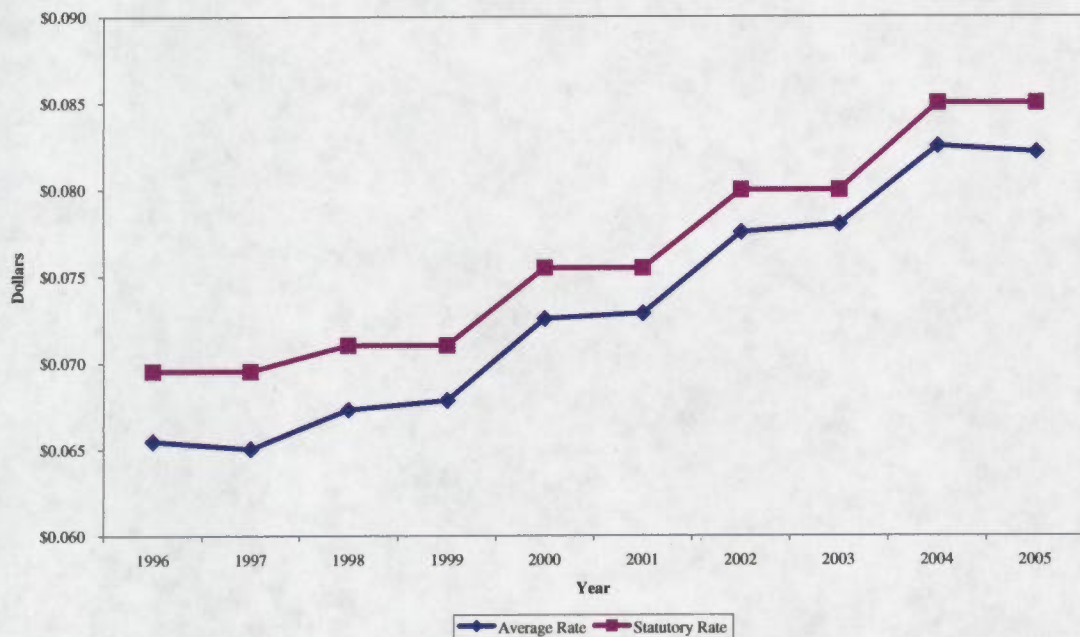
⁶ The HFA dataset contained 99,408 licenses labeled as "Controlled." Of the 99,408 licenses, 4 licenses were excluded by Dr. Landes in prior STATA steps; the remaining 99,404 licenses were excluded by Dr. Landes as having the "Controlled" condition.

**Figure 6: Number of Licenses Issued Below the Statutory Rate
Physical - Including Controlled**



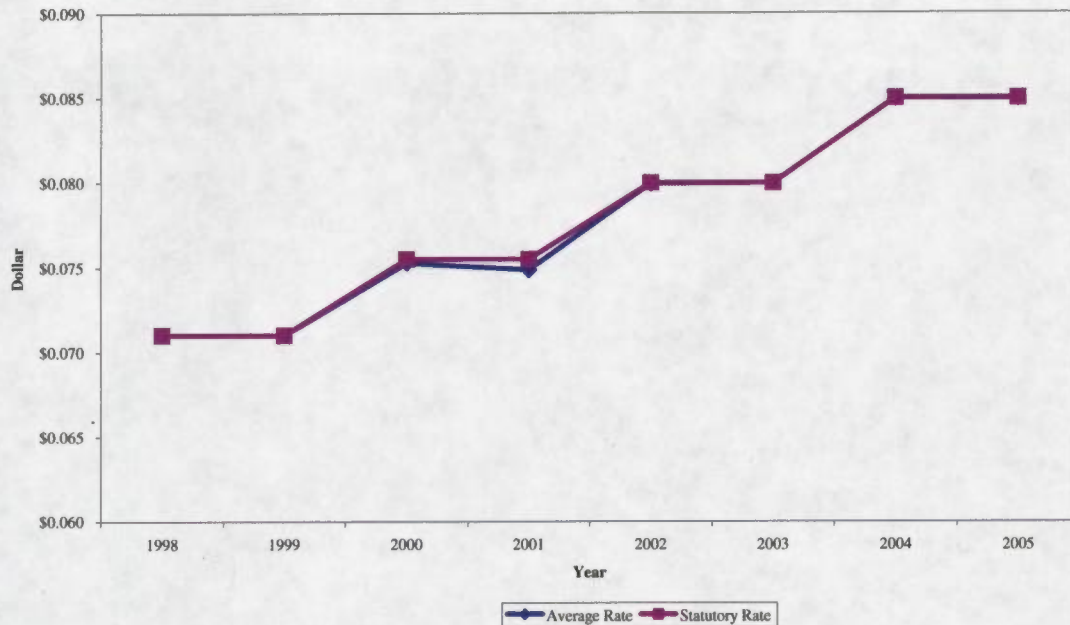
In addition, if one includes the controlled licenses that Dr. Landes excluded, it is no longer true that the average rate for physical licenses is closer to the statutory rate in later years than in earlier years. To the contrary, the two increase at about the same rate, and in fact begin to diverge in 2004. This is depicted below in **Figure 7**.

**Figure 7: Average Rate over Time
Physical with Controlled**



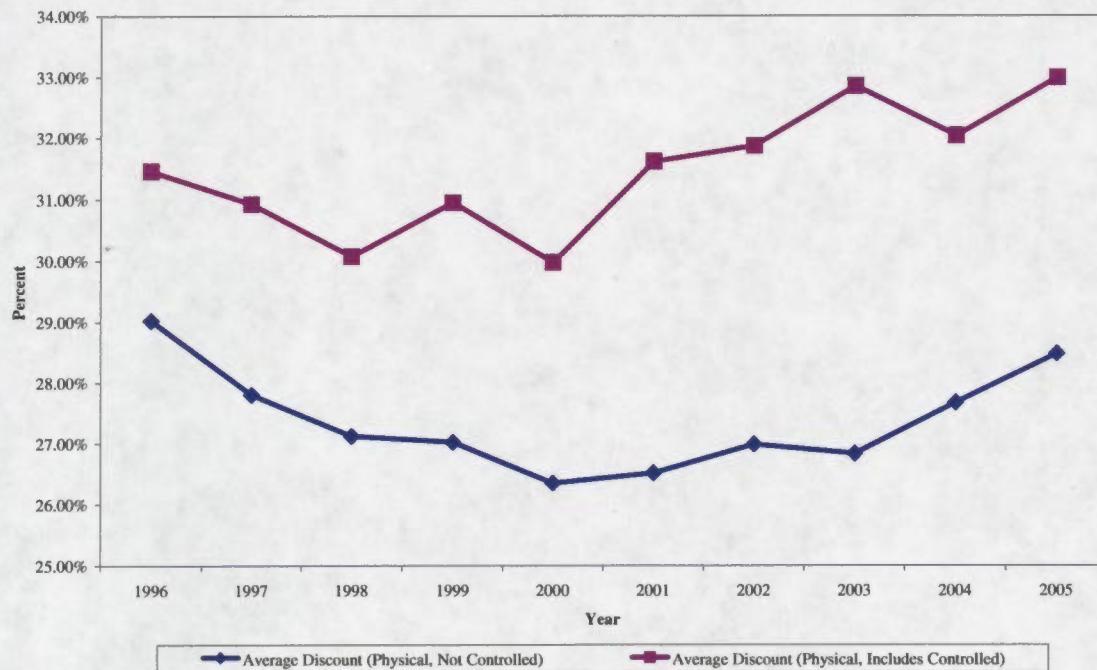
The same is true for digital. See **Figure 8**.

**Figure 8: Average Rate over Time
Digital with Controlled**



Additionally, had Dr. Landes included controlled licenses, not only would the average rate discount be greater in each year, but more importantly, the differential in the average rate would increase during the period from 2000-2005. See **Figure 9** below.

**Figure 9: Average Percentage Discount
Physical Licenses**



In summary, Dr. Landes's decision to not include controlled licenses resulted in: (1) a smaller number of discounted licenses than if controlled licenses were included in his analysis, (2) an average rate that appears to have increased more rapidly than if controlled licenses were included in his analysis, and (3) an average discount amount that appears to be lower than if controlled licenses were included in his analysis. Importantly, these observations are based on the alternative use of a single variable, that of controlled licenses only. If combined with all variables that could have been processed differently as described herein, the results would have an even greater impact on the conclusions drawn by Dr. Landes based on the same dataset.

(4) Dr. Landes Additionally Excluded Over 700,000 Non-Controlled, Discounted Licenses

In addition to listing whether or not a license is controlled, the HFA data lists several other formats of rate information in the license table, including percentages, dollar amounts, and text descriptions such as "Negotiated," "Statutory," and "Other Non-Stat." Dr. Landes used this rate information for each license as the final criteria to include or exclude licenses from his analysis. In order to accommodate the various formats, Dr. Landes implemented a hierarchically stepped STATA procedure. Described below are the steps of that procedure:

- If the full text of the rate value is *"75% OF STATUTORY FOR CASS. AND 90% OF STATUTORY FOR CD"*, then Dr. Landes considered the license to have been issued at 90% of the statutory rate in existence during the year issued.
- If the rate value is a number followed by *"% OF STATUTORY"*, Dr. Landes considered the license to have been issued at the indicated number as a percentage of the statutory rate in existence during the year issued (e.g., *"75% OF STATUTORY"*).⁷
- If the rate value begins with a dollar sign ("*\$*") followed by a number, then Dr. Landes considered the number to be the amount paid.⁸
- If the rate value explicitly states *"STATUTORY"* or *"MINIMUM STATUTORY"* and is not preceded by a percentage value (e.g., *"75% OF MINIMUM STATUTORY WITHOUT REGARD TO PLAYING TIME"*), Dr. Landes considered the license to have been issued at the statutory rate in existence during the year issued.
- If the rate value contains a percentage followed by a text string, the license was considered to have been issued as the indicated percentage value of the statutory rate in existence during the year issued (e.g., *"75% OF MINIMUM STATUTORY WITHOUT REGARD TO PLAYING TIME"*).
- If the rate field contains the string *"DOUBLE"* or *"TRIPLE"*, then the license was considered to have been issued at the statutory rate in existence during the year issued.

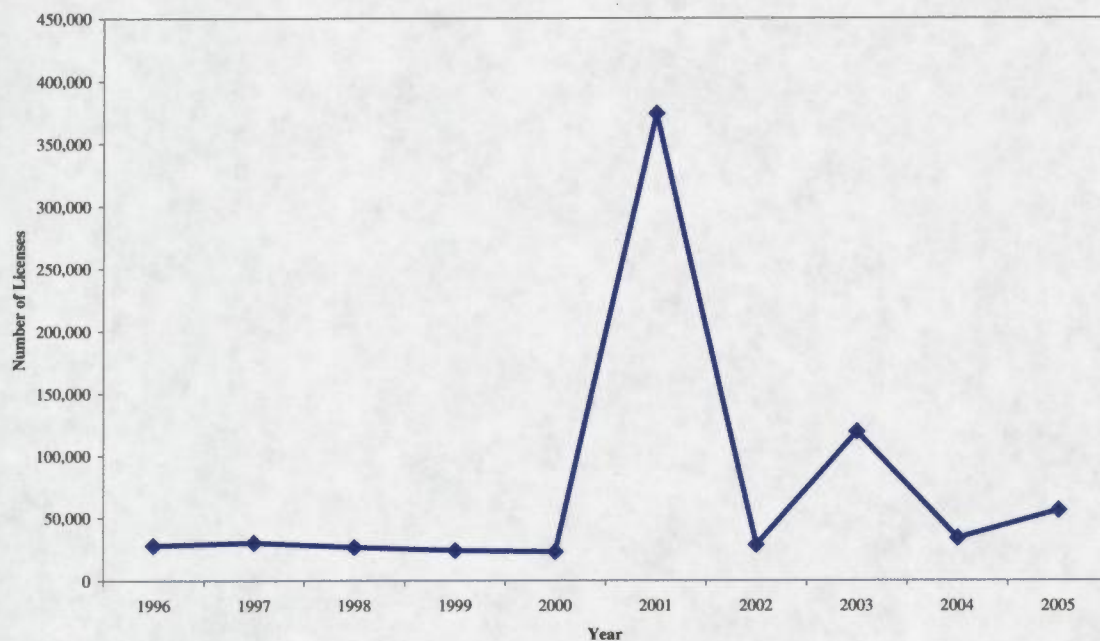
⁷ The STATA code does not appear to account for extreme percentage outliers; the percentages considered ranged from 00.02% - 98.45% of statutory.

⁸ The STATA code does not appear to account for extreme dollar outliers; the values considered ranged from \$.0000566 to \$.8900000.

The STATA logic was clearly meant to standardize the inconsistencies across the recorded rate values. However, more than 735,000 licenses were not considered in Dr. Landes's analysis because the rate is listed as negotiated or the rate description is listed as reduced but the exact amount of the rate is not specified. All of these licenses presumably were for rates below the statutory rate. All were for configurations that were included in Dr. Landes's analyses in those instances where a numeric rate appeared.

Excluding nearly three quarters of a million discounted licenses definitively altered the outcome of Dr. Landes's analysis. Adding these licenses back and then rerunning Dr. Landes's analysis results in a trend for "physical non-controlled" licenses that contradicts the trend observed with their omission. Specifically, the number of physical licenses issued below the statutory rate actually increases since 2002 if the rates identified as reduced or negotiated are included. See below in **Figure 10**.

**Figure 10: Number of Licenses Issued below the Statutory Rate
Physical - Not Controlled**

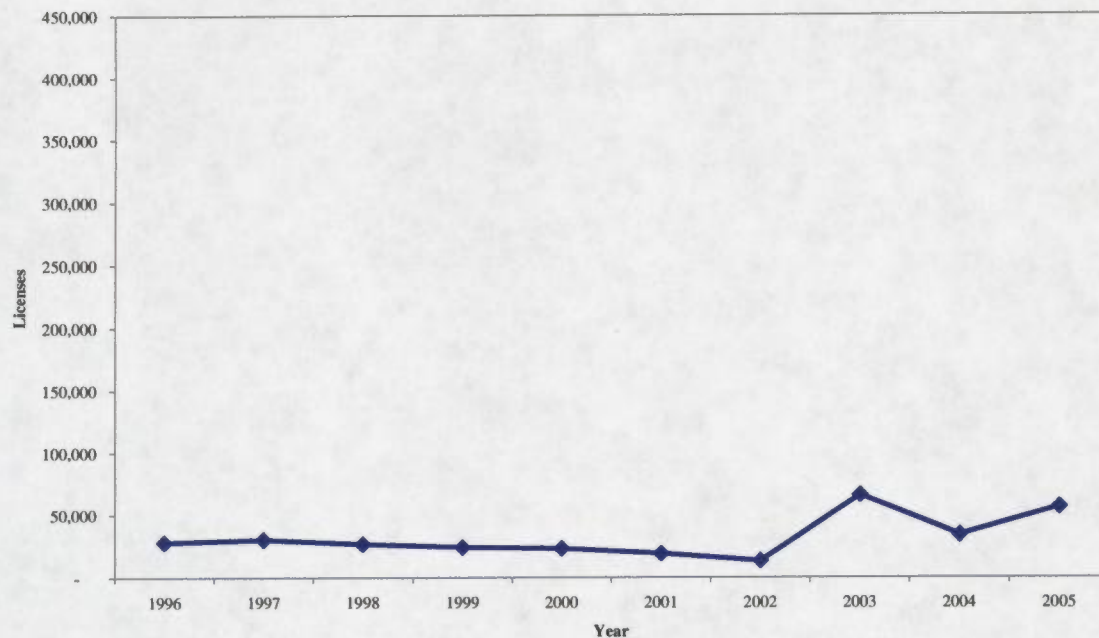


The spike in Figure 10 for the year 2001 can be explained by the fact that Dr. Landes classified a substantial number of licenses with the configuration code "Streaming (Single)" as *physical* licenses.⁹ Even after excluding the Streaming licenses that Dr. Landes classified as physical, however, the number of licenses issued below the

⁹ In fact, Dr. Landes classified everything as physical that was not coded as one of the following: "Digital Permanent Download (DPD) (Album)"; "Digital Permanent Download (DPD) (Single)"; "Digital Preload Single - Unlock"; "Digital Preload Single - Load"; and "Use in Covered Services Under This Agreement." Because physical was his default, Dr. Landes classified the following seemingly digital configurations as physical: "Digital Jukebox Play"; "Fixation"; "Locked Content (Album)"; "Locked Content (Single)"; "Phonic Ringtone"; "Ringback"; and "Streaming (Single)."

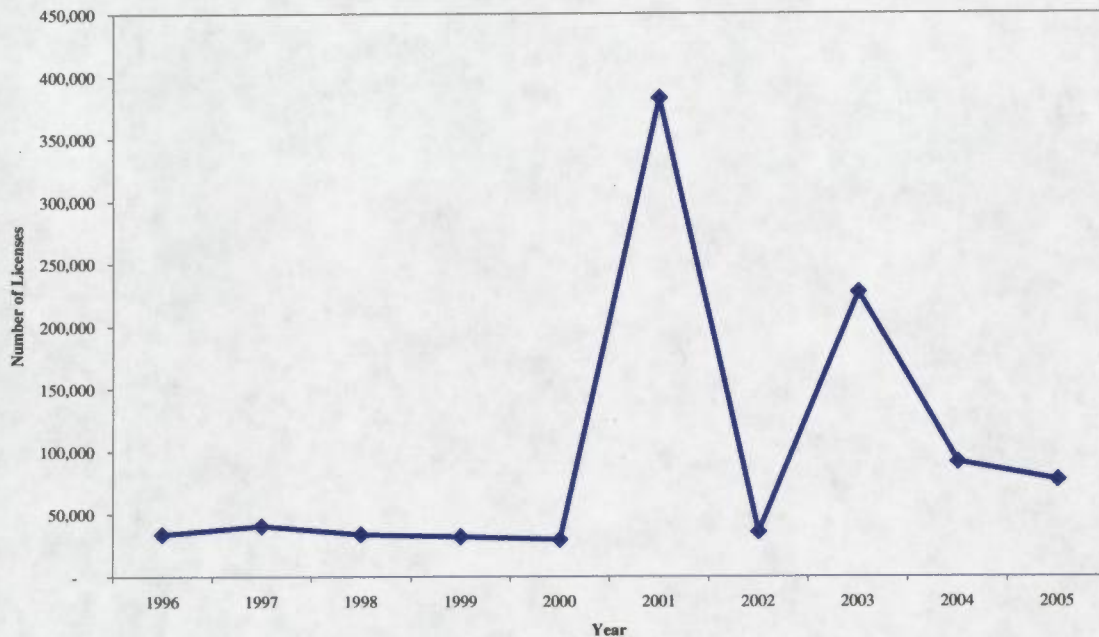
statutory rate still increases since 2002 after the rates identified as reduced or negotiated are included.

**Figure 11: Number of Licenses Issued below the Statutory Rate
Physical - Not Controlled -Excluding Streaming (Single)**



Additionally, adding in both the negotiated/reduced licenses excluded for lack of a rate, the negotiated/reduced licenses excluded for lack of a configuration code, and the controlled licenses excluded as controlled, the HFA data show a substantial increase in the number of discounted digital and physical licenses after 2002 compared to those issued in 1996 through 2000. See below in **Figure 12**.

Figure 12: Number of Licenses Issued below the Statutory Rate
Digital and Physical - Includes Controlled, Non-Convertible Rates, & Licenses Lacking Configuration



Dr. Landes's exclusion of all of the discounted licenses described above may explain, at least in part, the answer to a question asked by Judge Roberts of Dr. Landes during his oral direct testimony. Judge Roberts asked Dr. Landes:

JUDGE ROBERTS: We have heard testimony from songwriters so far that confirm that, that they're happy to get something rather than nothing. But my principal question to you about this is, why does that kind of activity seem to be decreasing significantly as this chart goes down to 2005?

(2/7/08 Tr. 2155:5-11). Judge Roberts continued:

JUDGE ROBERTS: The testimony that we have from the songwriters is, as you pointed out with respect to the early portion here, 1996, 1997, boy, they're just glad to get on the album and just glad to get something. But, curiously, that testimony seems to be not only with respect to, I'm sure, back in 1996, but today as well, that gosh, we're just glad to get on a compilation album and hit the store in Wal-Mart and get something out of this. And yet this chart is not showing that to still be the case, and that's why I found it rather curious.

(2/7/08 Tr. 2157:5-17).

The exclusion of nearly three quarters of a million discounted licenses would certainly explain why the phenomenon of widespread discounting that the Copyright Owners' songwriter witnesses testified about¹⁰ was not reflected on Dr. Landes's Figures.

C. Dr. Landes Made No Efforts to Adjust for Changes in HFA's Market Share.

I observed that after Dr. Landes culled the HFA data to the limited set I have described above, he made no effort to compare the HFA data to data from the individual music publishing companies or to adjust his results for any shift in HFA's market share over the period he studied, 1996-2005.

The data that Dr. Landes studied is only data from HFA, not from any of the individual music publishing companies. I understand from the testimony of both Dr. Landes and Andrea Finkelstein that the record companies negotiate most of their discounted mechanical licenses with the individual music publishing companies that own the copyright rather than HFA because HFA itself cannot give a discount below the statutory rate without going to the individual publishing companies. (2/11/08 Tr. 2534:2-8 (Landes); 2/14/08 Tr. 3334:15-3335:6 (Finkelstein, A.)).

If record companies are obtaining most of their discounted mechanical licenses from the individual publishing companies rather than HFA, Dr. Landes's results would not necessarily be representative of an industry trend. Furthermore, if HFA's market share has decreased over the period Dr. Landes studied, then because Dr. Landes made no effort to account for that decline, the data could merely reflect HFA's declining market share rather than the discounting trends Dr. Landes describes in his direct testimony.

¹⁰ See, e.g., 1/28/08 Tr. 219:16-221:4 (Carnes); 1/30/08 Tr. 830:5-13 (Shaw)

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I also identified and documented the embedded assumptions in Dr. Landes's STATA code relating to the inclusion and exclusion of certain HFA data records that resulted in his substantially narrower dataset. I set out to determine whether, if employed differently, Dr. Landes's STATA code would substantially affect his analysis and conclusions. I also reviewed the HFA data for information that was not considered by Dr. Landes, but may be relevant to the Copyright Royalty Judges' rate adjustment proceeding. In the course of evaluating the HFA data and Dr. Landes's analysis thereof, my colleagues and I considered over 100 million HFA licensing and distribution records in addition to hundreds of lines of complex STATA code.

4. Observations

A. There Is a High Likelihood of Missing Data from HFA's Database

I observed that in the HFA dataset, each issued license is represented by both a *unique* and a *whole number*, fitting the description of a primary key. Therefore, using the license as the primary key, I observed numerous substantial gaps in the sequence of numbering of the records in the database. Although I cannot say with certainty that gaps in the license number sequencing are caused by missing HFA data, it is consistent with what would be expected if data were missing.

¹ Specifically, I received and evaluated three proprietary STATA file types purported to have been created and used by Dr. Landes: the *input file* (which is the STATA data file ending in ".dta"); the *program file* that acts upon the *input file* (which is a text file containing a list of STATA commands ending in ".do"); and the *dictionary file* (which is the STATA file that describes the format of the *input file*).

B. Dr. Landes Excluded More Licenses from His Analysis Than He Included

(1) Dr. Landes Systematically Excluded Over 5,000 Licenses for Lack of a Configuration Code

Dr. Landes used STATA commands to evaluate the license information provided by HFA. Based on the documents and native files produced by the Copyright Owners, it appears that HFA provided Dr. Landes with two primary tables: one containing issued licenses and the other containing the configuration codes associated with those licenses. Configuration codes are generally two letters that signify the format in which a song is released and sold. Examples of configuration codes include "CD," "LP," and "SL," which respectively stand for "Compact Disc (Album)," "12 inch Vinyl (Album)," and "Single." A total of 49 different configuration codes appear in the HFA data. I received in discovery a list of 56 select configuration codes and their definitions, which is attached as **Appendix A**.

The number of licenses and configurations listed in the two tables provided by HFA is depicted below in **Figure 1**. A license can have more than one corresponding configuration because it is my understanding that when parties negotiate licenses, they may negotiate for numerous formats at once in the interest of efficiency. Accordingly, the configuration table includes more records than the license table.

Figure 1

Table	Records
Licenses	7,875,781
Configurations	8,835,792

The first procedural step in Dr. Landes's STATA code is to eliminate all licenses that do not have a configuration listed in the license configuration table. I depict the number of licenses with and without a configuration code below in **Figure 2**.

Figure 2

License Table	Licenses	%
Identified with a Configuration	7,870,589	99.93%
Identified without a Configuration (Excluded)	5,192	0.07%
Total Licenses	7,875,781	100%

Dr. Landes thus excluded over five thousand licenses (5,192) because HFA failed to identify a configuration code for them.

The total number of licenses issued each year is listed below in **Figure 3**.² The 5,192 excluded licenses are depicted below in **Figure 4**.

² Figure 3 shows a growth in the number of licenses issued over time, but this does not necessarily equate to an increase in the number of songs being licensed or recorded over time. Rather, it is most likely the result of an increase in licenses to digital services as they have become more prevalent and diverse.

Figure 3: Licenses Issued Per Year

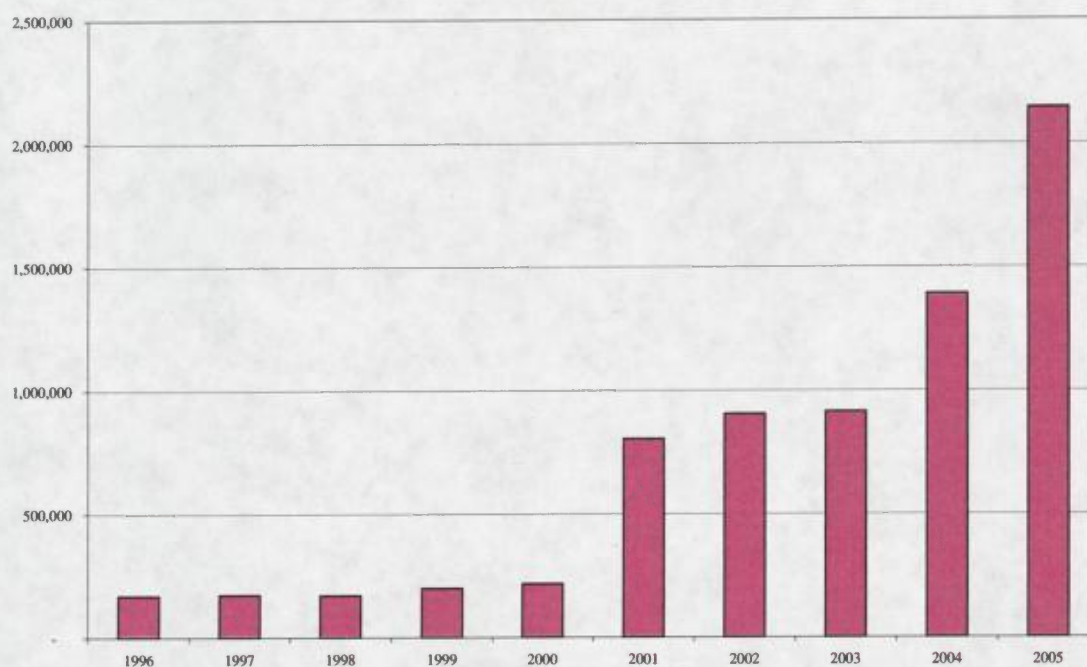
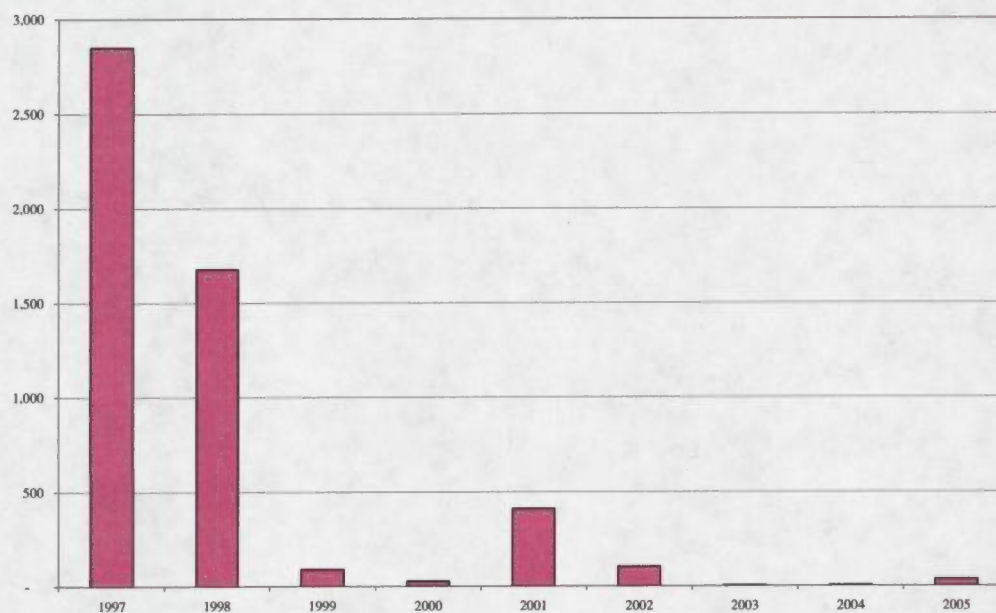


Figure 4: Missing License Configurations



Of the 5,192 licenses excluded for lack of a configuration code, most were licenses that had rates that were discounted below the statutory rate. In the license table, the HFA data lists information about the rate at which each license was issued. This information includes percentages, dollar amounts, and text descriptions such as “Negotiated,” “Statutory,” and “Other Non-Stat.” The rate information for the 5,192 licenses Dr. Landes excluded for lack of a configuration code is depicted in **Appendix B**, which is

appended to my testimony. That rate information shows that of the 5,192 licenses Dr. Landes excluded for lack of a configuration code, over 4,201 were licenses with a rate of "Negotiated", "Reduced", or some percentage of the statutory rate.

(2) Dr. Landes Excluded an Additional 4 Million Licenses by Categorizing Them as "Other Digital" Licenses

After excluding licenses without a configuration code, the next procedural step in Dr. Landes's STATA code was to combine the license and configuration tables in order to classify each license as *full digital*, *other digital*, or *physical*.

As noted earlier, licenses can be issued for more than one configuration, which can include configurations that meet all three classifications. In order to determine the classification for licenses with multiple configurations, Dr. Landes established an order of precedence which includes the following hierarchical business rules:

- If at least one configuration indicates a DPD related to a single or album – the license is classified as full digital
- From the remaining license pool, if at least one configuration indicates "Covered Services" or "Digital Preload Singles" – the license is classified as other digital
- All remaining licenses regardless of configuration are considered physical

One consequence of Dr. Landes's STATA program was that he systematically excluded all licenses categorized as *other digital* from further consideration. In full, over 4 million licenses with a configuration code of CV (Covered Services), PL (Digital Pre-Load Single), and PU (Digital Pre-Load Single Unlock), were excluded by Dr. Landes on the basis of being classified as "Other Digital."

Dr. Landes's configuration code mapping thus resulted in the exclusion of these 4 million records in addition to the more than 5,000 records already excluded for lack of a configuration code. These exclusions are depicted below in **Figure 5**.

Figure 5

Category	Licenses	%
Physical and Digital	3,813,992	48.43%
Excluded - No Configuration Code	5,192	0.07%
Excluded - Configuration is Categorized as "Other Digital"	4,056,597	51.51%
Total Licenses	7,875,781	100.00%

(3) Dr. Landes Excluded All Licenses Labeled "Controlled"

After excluding the various categories of licenses described above -- licenses lacking configuration codes, and licenses that Dr. Landes classified as "Other Digital" -- Dr. Landes then utilized various other pieces of information stored in the license table to further cull licenses from consideration. The following hierarchical business rules were applied in the STATA code to exclude additional records:

Exclude if...

- Rate Type = "Controlled"
- Rate Type = "CV TBD"
- Issue Date > December 31, 2005³

Dr. Landes excluded all licenses labeled "controlled," presumably based on the assumption that they represented licenses subject to controlled composition clauses. His analysis was deliberately focused on non-controlled licenses. There are over 99,000 licenses and over 190,000 associated configurations categorized as controlled in the database – all of which were excluded by Dr. Landes.⁴ The vast majority were licenses he would have categorized as physical products. The configurations for the 99,000 controlled licenses that Dr. Landes excluded are depicted by their configuration description and by year in **Appendix C**.⁵

Had controlled licenses not been excluded, all else being equal, Dr. Landes would have had over 68,000 additional licenses in his combined final physical and digital datasets.⁶

Adding back only the excluded controlled licenses would have altered Dr. Landes's conclusions about the number of licenses issued below the statutory rate. In fact, Dr. Landes would have observed a trend toward a *rising* number of licenses issued below the statutory rate since 2003. This trend is depicted in **Figure 6** below. To arrive at these figures, I followed the same procedures employed by Dr. Landes with the sole difference being the inclusion of controlled composition licenses.

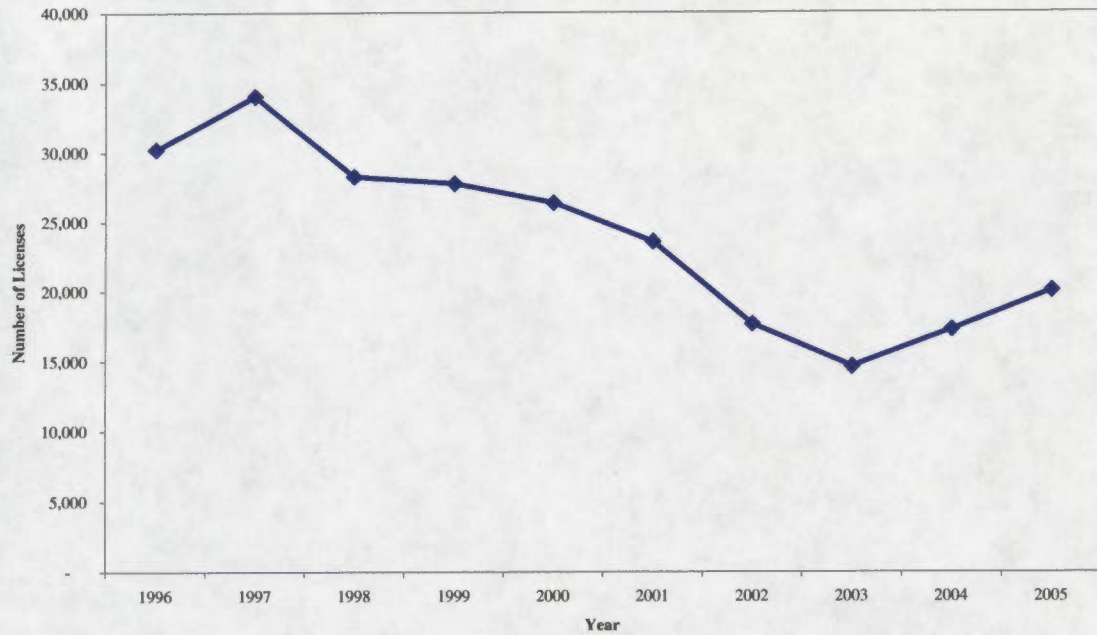
³ Based on the HFA data produced to FTI, it appears that there is data available through July 2006. Anything more recent than December 31, 2005 was excluded by Dr. Landes.

⁴ Although this is a substantial number of licenses to have excluded, the number of licenses that Dr. Landes labeled controlled is surprisingly small relative to the total number of licenses in the database, considering the testimony of Andrea Finkelstein, Irwin Robinson, and Rick Carnes that a majority of licenses are issued pursuant to controlled composition clauses. See 2/14/08 Tr. 3331:4-3332:11 (Finkelstein, A.); 1/31/08 Tr. 1010:18-21 (Robinson) (testifying that controlled composition clauses are increasingly "prevalent and complex"); 1/28/08 Tr. 221:21-222:15 (Carnes) (testifying that "[e]very record label had controlled composition clauses and when we shopped around to other labels, they all had the same thing" and that record companies "try to impose [controlled composition clauses] on practically everyone.").

⁵ There are approximately two configurations per license accounting for the 190,254 configurations in Appendix C.

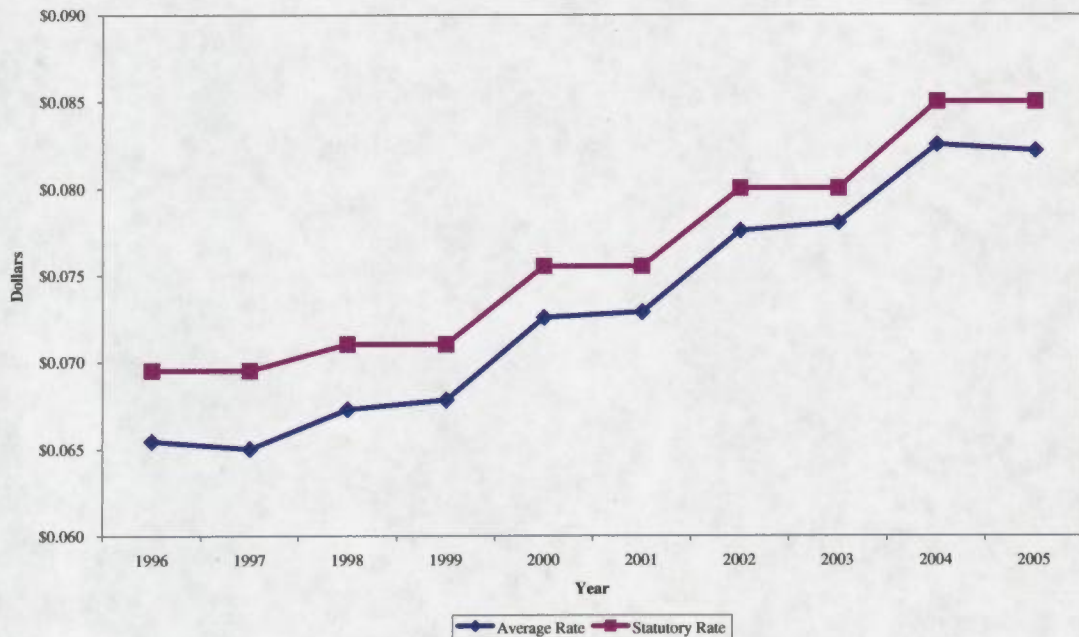
⁶ The HFA dataset contained 99,408 licenses labeled as "Controlled." Of the 99,408 licenses, 4 licenses were excluded by Dr. Landes in prior STATA steps; the remaining 99,404 licenses were excluded by Dr. Landes as having the "Controlled" condition.

Figure 6: Number of Licenses Issued Below the Statutory Rate
Physical - Including Controlled



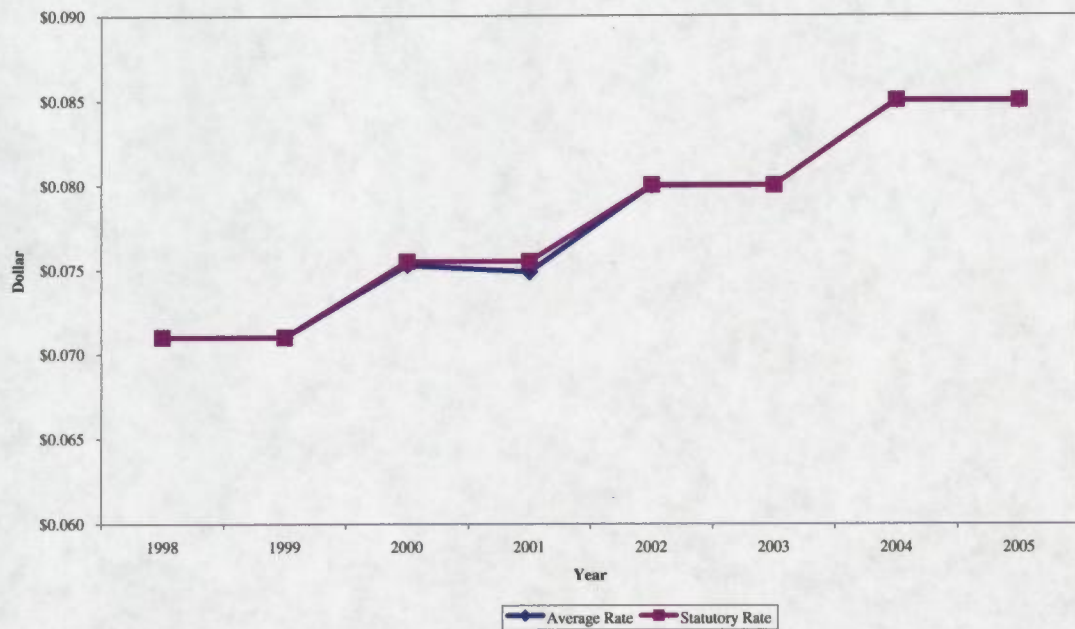
In addition, if one includes the controlled licenses that Dr. Landes excluded, it is no longer true that the average rate for physical licenses is closer to the statutory rate in later years than in earlier years. To the contrary, the two increase at about the same rate, and in fact begin to diverge in 2004. This is depicted below in **Figure 7**.

Figure 7: Average Rate over Time
Physical with Controlled



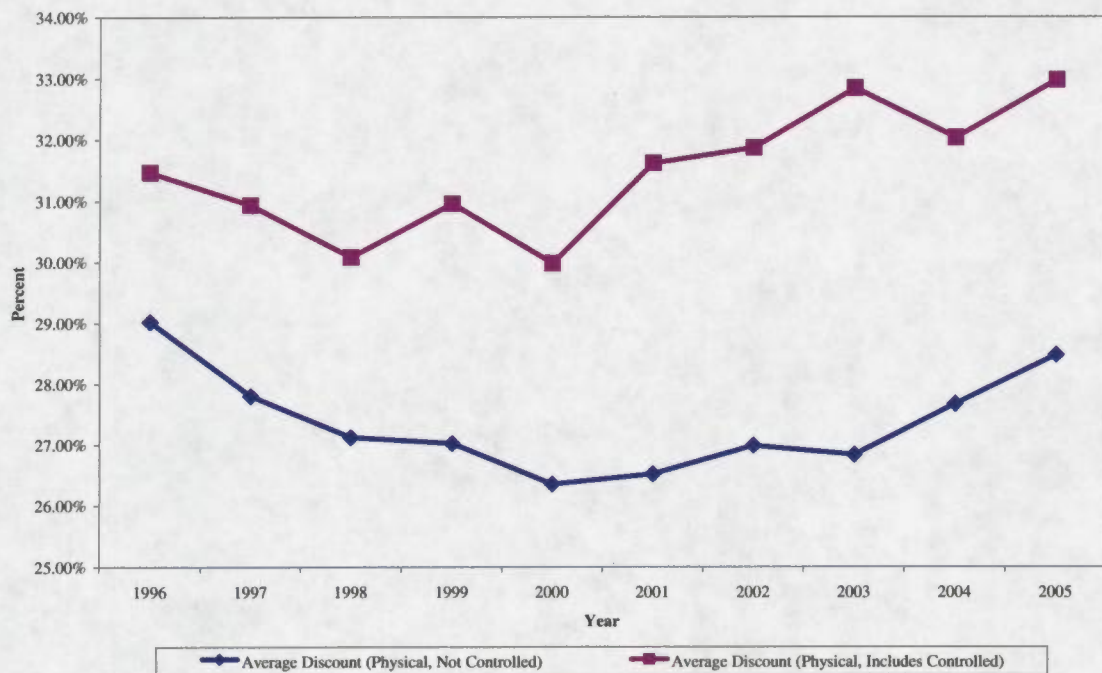
The same is true for digital. See **Figure 8**.

**Figure 8: Average Rate over Time
Digital with Controlled**



Additionally, had Dr. Landes included controlled licenses, not only would the average rate discount be greater in each year, but more importantly, the differential in the average rate would increase during the period from 2000-2005. See **Figure 9** below.

**Figure 9: Average Percentage Discount
Physical Licenses**



In summary, Dr. Landes's decision to not include controlled licenses resulted in: (1) a smaller number of discounted licenses than if controlled licenses were included in his analysis, (2) an average rate that appears to have increased more rapidly than if controlled licenses were included in his analysis, and (3) an average discount amount that appears to be lower than if controlled licenses were included in his analysis. Importantly, these observations are based on the alternative use of a single variable, that of controlled licenses only. If combined with all variables that could have been processed differently as described herein, the results would have an even greater impact on the conclusions drawn by Dr. Landes based on the same dataset.

(4) Dr. Landes Additionally Excluded Over 700,000 Non-Controlled, Discounted Licenses

In addition to listing whether or not a license is controlled, the HFA data lists several other formats of rate information in the license table, including percentages, dollar amounts, and text descriptions such as "Negotiated," "Statutory," and "Other Non-Stat." Dr. Landes used this rate information for each license as the final criteria to include or exclude licenses from his analysis. In order to accommodate the various formats, Dr. Landes implemented a hierarchically stepped STATA procedure. Described below are the steps of that procedure:

- If the full text of the rate value is *"75% OF STATUTORY FOR CASS. AND 90% OF STATUTORY FOR CD"*, then Dr. Landes considered the license to have been issued at 90% of the statutory rate in existence during the year issued.
- If the rate value is a number followed by *"% OF STATUTORY,"* Dr. Landes considered the license to have been issued at the indicated number as a percentage of the statutory rate in existence during the year issued (e.g., *"75% OF STATUTORY"*).⁷
- If the rate value begins with a dollar sign ("*\$*") followed by a number, then Dr. Landes considered the number to be the amount paid.⁸
- If the rate value explicitly states *"STATUTORY"* or *"MINIMUM STATUTORY"* and is not preceded by a percentage value (e.g., *"75% OF MINIMUM STATUTORY WITHOUT REGARD TO PLAYING TIME"*), Dr. Landes considered the license to have been issued at the statutory rate in existence during the year issued.
- If the rate value contains a percentage followed by a text string, the license was considered to have been issued as the indicated percentage value of the statutory rate in existence during the year issued (e.g., *"75% OF MINIMUM STATUTORY WITHOUT REGARD TO PLAYING TIME"*).
- If the rate field contains the string *"DOUBLE"* or *"TRIPLE,"* then the license was considered to have been issued at the statutory rate in existence during the year issued.

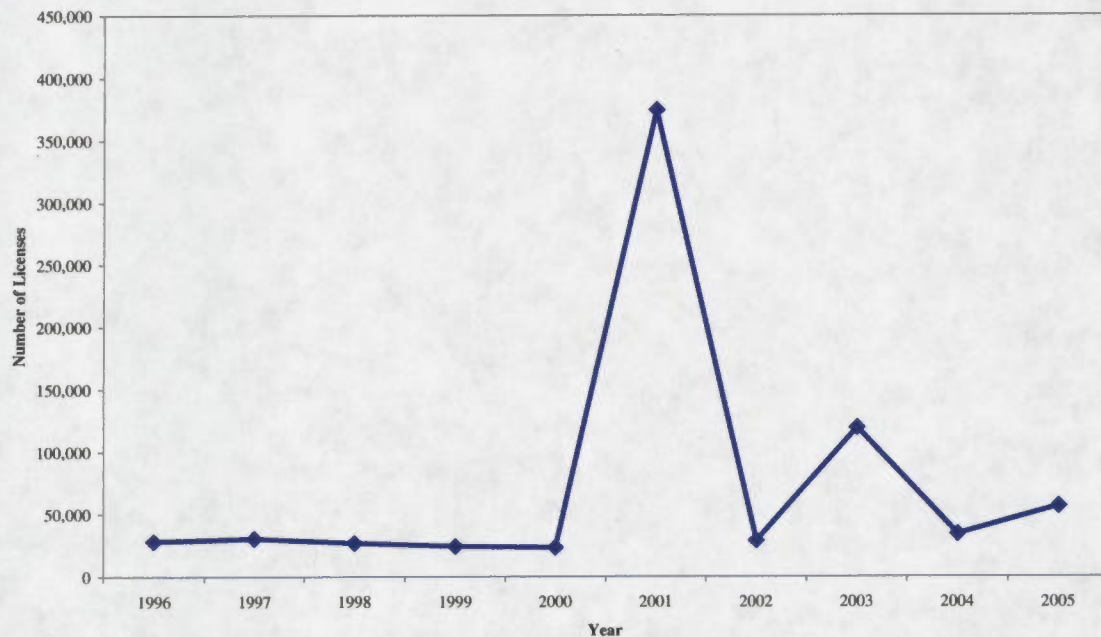
⁷ The STATA code does not appear to account for extreme percentage outliers; the percentages considered ranged from 00.02% - 98.45% of statutory.

⁸ The STATA code does not appear to account for extreme dollar outliers; the values considered ranged from \$.0000566 to \$.8900000.

The STATA logic was clearly meant to standardize the inconsistencies across the recorded rate values. However, more than 735,000 licenses were not considered in Dr. Landes's analysis because the rate is listed as negotiated or the rate description is listed as reduced but the exact amount of the rate is not specified. All of these licenses presumably were for rates below the statutory rate. All were for configurations that were included in Dr. Landes's analyses in those instances where a numeric rate appeared.

Excluding nearly three quarters of a million discounted licenses definitively altered the outcome of Dr. Landes's analysis. Adding these licenses back and then rerunning Dr. Landes's analysis results in a trend for "physical non-controlled" licenses that contradicts the trend observed with their omission. Specifically, the number of physical licenses issued below the statutory rate actually increases since 2002 if the rates identified as reduced or negotiated are included. See below in **Figure 10**.

**Figure 10: Number of Licenses Issued below the Statutory Rate
Physical - Not Controlled**

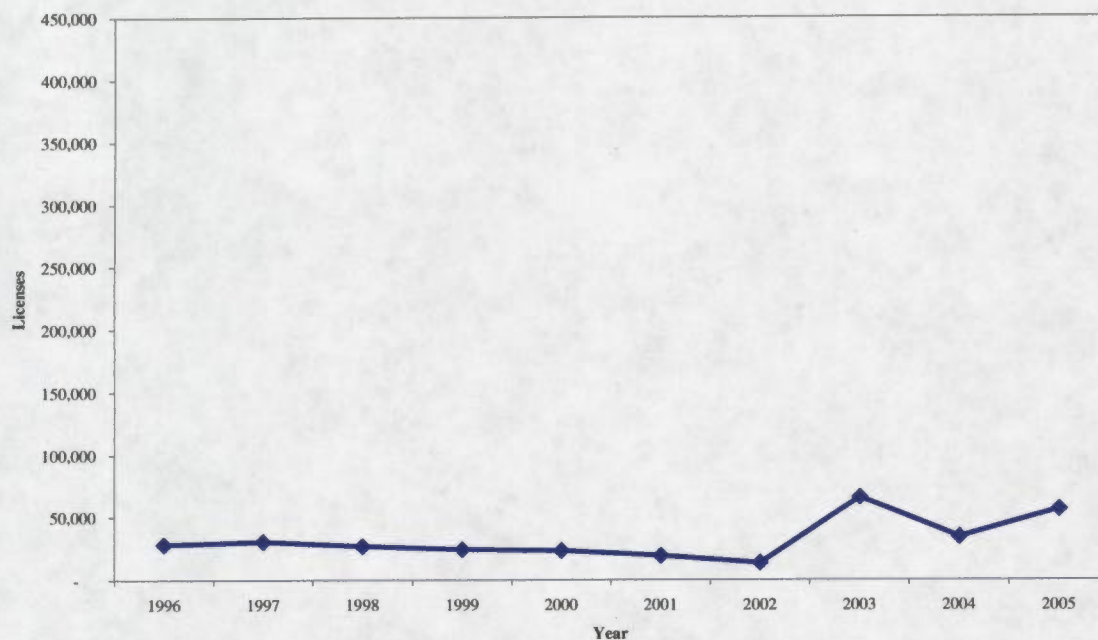


The spike in Figure 10 for the year 2001 can be explained by the fact that Dr. Landes classified a substantial number of licenses with the configuration code "Streaming (Single)" as *physical* licenses.⁹ Even after excluding the Streaming licenses that Dr. Landes classified as physical, however, the number of licenses issued below the

⁹ In fact, Dr. Landes classified everything as physical that was not coded as one of the following: "Digital Permanent Download (DPD) (Album)"; "Digital Permanent Download (DPD) (Single)"; "Digital Preload Single - Unlock"; "Digital Preload Single - Load"; and "Use in Covered Services Under This Agreement." Because physical was his default, Dr. Landes classified the following seemingly digital configurations as physical: "Digital Jukebox Play"; "Fixation"; "Locked Content (Album)"; "Locked Content (Single)"; "Phonic Ringtone"; "Ringback"; and "Streaming (Single)."

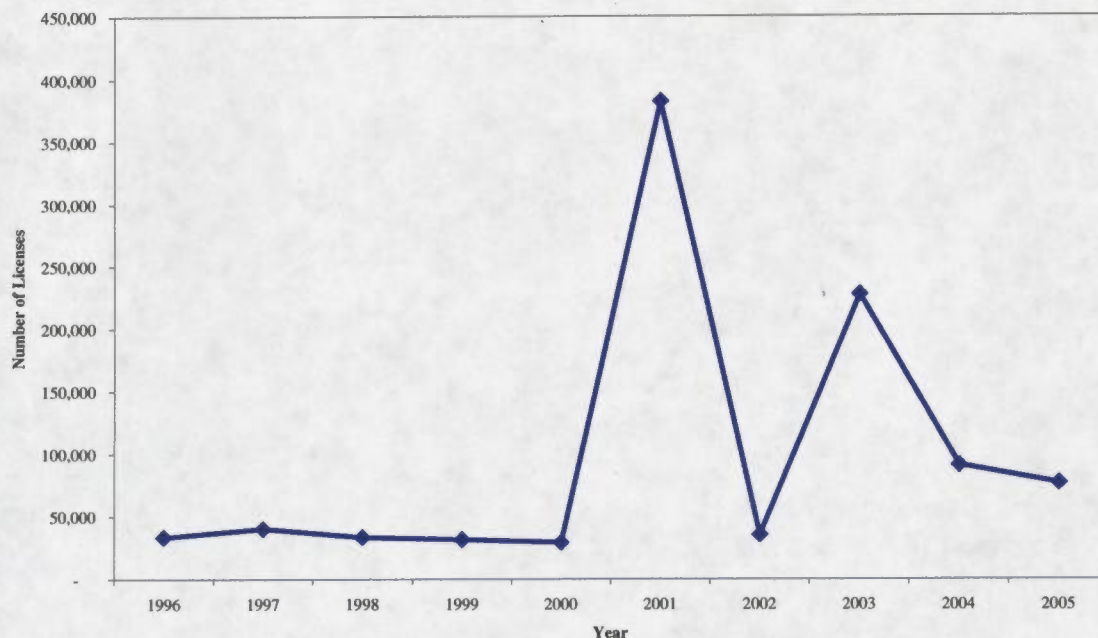
statutory rate still increases since 2002 after the rates identified as reduced or negotiated are included.

**Figure 11: Number of Licenses Issued below the Statutory Rate
Physical - Not Controlled -Excluding Streaming (Single)**



Additionally, adding in both the negotiated/reduced licenses excluded for lack of a rate, the negotiated/reduced licenses excluded for lack of a configuration code, and the controlled licenses excluded as controlled, the HFA data show a substantial increase in the number of discounted digital and physical licenses after 2002 compared to those issued in 1996 through 2000. See below in **Figure 12**.

Figure 12: Number of Licenses Issued below the Statutory Rate
Digital and Physical - Includes Controlled, Non-Convertible Rates, & Licenses Lacking Configuration



Dr. Landes's exclusion of all of the discounted licenses described above may explain, at least in part, the answer to a question asked by Judge Roberts of Dr. Landes during his oral direct testimony. Judge Roberts asked Dr. Landes:

JUDGE ROBERTS: We have heard testimony from songwriters so far that confirm that, that they're happy to get something rather than nothing. But my principal question to you about this is, why does that kind of activity seem to be decreasing significantly as this chart goes down to 2005?

(2/7/08 Tr. 2155:5-11). Judge Roberts continued:

JUDGE ROBERTS: The testimony that we have from the songwriters is, as you pointed out with respect to the early portion here, 1996, 1997, boy, they're just glad to get on the album and just glad to get something. But, curiously, that testimony seems to be not only with respect to, I'm sure, back in 1996, but today as well, that gosh, we're just glad to get on a compilation album and hit the store in Wal-Mart and get something out of this. And yet this chart is not showing that to still be the case, and that's why I found it rather curious.

(2/7/08 Tr. 2157:5-17).

The exclusion of nearly three quarters of a million discounted licenses would certainly explain why the phenomenon of widespread discounting that the Copyright Owners' songwriter witnesses testified about¹⁰ was not reflected on Dr. Landes's Figures.

C. Dr. Landes Made No Efforts to Adjust for Changes in HFA's Market Share.

I observed that after Dr. Landes culled the HFA data to the limited set I have described above, he made no effort to compare the HFA data to data from the individual music publishing companies or to adjust his results for any shift in HFA's market share over the period he studied, 1996-2005.

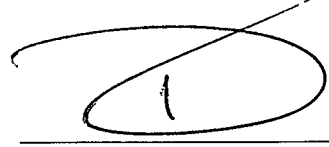
The data that Dr. Landes studied is only data from HFA, not from any of the individual music publishing companies. I understand from the testimony of both Dr. Landes and Andrea Finkelstein that the record companies negotiate most of their discounted mechanical licenses with the individual music publishing companies that own the copyright rather than HFA because HFA itself cannot give a discount below the statutory rate without going to the individual publishing companies. (2/11/08 Tr. 2534:2-8 (Landes); 2/14/08 Tr. 3334:15-3335:6 (Finkelstein, A.)).

If record companies are obtaining most of their discounted mechanical licenses from the individual publishing companies rather than HFA, Dr. Landes's results would not necessarily be representative of an industry trend. Furthermore, if HFA's market share has decreased over the period Dr. Landes studied, then because Dr. Landes made no effort to account for that decline, the data could merely reflect HFA's declining market share rather than the discounting trends Dr. Landes describes in his direct testimony.

¹⁰ See, e.g., 1/28/08 Tr. 219:16-221:4 (Carnes); 1/30/08 Tr. 830:5-13 (Shaw)

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 4/25/08



David Alfaro

APPENDIX A
CONFIGURATION CODES AND DESCRIPTIONS PROVIDED

LABEL	CODE	DESCRIPTION
CFG	A2	SACD/CD HYBRID (ALBUM)(2 SESSIONS)
CFG	A3	SUPER AUDIO CD/SUPER AUDIO CD (5.1 CHANNEL)/CD (ALBUM)(3 S
CFG	CC	COMPUTER CHIP (SINGLE)
CFG	CD	COMPACT DISC (ALBUM)
CFG	CL	EXPRESS LIVE CD (ALBUM)
CFG	CS	CASSETTE (ALBUM)
CFG	CV	USE IN COVERED SERVICES UNDER THIS AGREEMENT
CFG	C1	CD/CD HYBRID (2 SESSIONS) (SINGLE)
CFG	C2	CD/CD HYBRID (2 SESSIONS) (ALBUM)
CFG	DC	DIGITAL COMPACT CASSETTE (ALBUM)
CFG	DL	EXPRESS LIVE DPD
CFG	DP	DIGITAL PERMANENT DOWNLOAD (DPD) (ALBUM)
CFG	DT	DIGITAL AUDIO TAPE (ALBUM)
CFG	DV	AUDIO ONLY DIGITAL VIDEO DISC (DVD) (ALBUM)
CFG	D1	AUDIO-ONLY DVD/CD HYBRID (2 SESSIONS) (SINGLE)
CFG	D2	AUDIO-ONLY DVD/CD HYBRID (2 SESSIONS) (ALBUM)
CFG	FX	FIXATION
CFG	JP	DIGITAL JUKEBOX PLAY
CFG	L	LP (ALBUM)
CFG	LA	LOCKED CONTENT (ALBUM)
CFG	LC	LOCKED CONTENT (SINGLE)
CFG	LD	LOCAL DELIVERY
CFG	LL	LICENSED PLAY
CFG	LP	12" VINYL (ALBUM)
CFG	LT	TIME-LIMITED D.P.D
CFG	LU	USE LIMITED D.P.D.
CFG	MA	MIDI (ALBUM)
CFG	MB	MUSICAL MOVEMENT
CFG	MC	MINI-CASSETTE
CFG	MD	MINI-DISC (ALBUM)
CFG	MS	MIDI (SINGLE)
CFG	MX	MAXI-CASSETTE-SINGLE
CFG	PA	PAYABLE PLAY
CFG	PH	PHONIC RINGTONE
CFG	PL	DIGITAL PRELOAD SINGLE- LOAD
CFG	PM	PROMOTIONAL PLAY
CFG	PR	PIANO ROLL (SINGLE)
CFG	PU	DIGITAL PRELOAD SINGLE - UNLOCK
CFG	PZ	POCKETZIP
CFG	RB	RINGBACK
CFG	RR	PRE-RECORDED RINGTONE
CFG	S	STREAMING (SINGLE)
CFG	SA	STREAMING (ALBUM)
CFG	SC	CASSETTE (SINGLE)
CFG	SD	COMPACT DISC (SINGLE)
CFG	SL	SINGLE
CFG	SP	DIGITAL PERMANENT DOWNLOAD (DPD) (SINGLE)
CFG	SS	SUPER AUDIO CD (SINGLE)
CFG	SU	SUPER AUDIO CD (ALBUM)
CFG	S2	SACD/CD HYBRID (SINGLE)(2 SESSIONS)
CFG	S3	SUPER AUDIO CD/SUPER AUDIO CD (5.1 CHANNEL)/CD(SINGLE)(3 S
CFG	T	TAPE
CFG	XX	OTHER
CFG	7	07" VINYL (SINGLE)
CFG	12	12" VINYL (SINGLE)
CFG	2	LP AND TAPE
TOTAL CONFIGURATION CODES: 56		

APPENDIX B
LICENSES WITHOUT A CONFIGURATION CODE

YEAR	RATE TYPE	RATE	LICENSES
1997	OTHER NON-STAT	NEGOTIATED	2,841
1997	STATUTORY	STATUTORY	6
1998	OTHER NON-STAT	NEGOTIATED	1,010
1998	STATUTORY	STATUTORY	666
1999	OTHER NON-STAT	NEGOTIATED	87
1999	STATUTORY	STATUTORY	3
2000	STATUTORY	STATUTORY	27
2001	REDUCED	00.02% OF STATUTORY - 98.45% OF STATUTORY	4
2001	STATUTORY	STATUTORY	210
2001	CONTROLLED	\$.0000566 - \$.8900000	4
2001	OTHER NON-STAT	NEGOTIATED	190
2002	OTHER NON-STAT	NEGOTIATED	66
2002	STATUTORY	STATUTORY	37
2003	STATUTORY	STATUTORY	3
2004	CV TBD	STATUTORY RATE TO BE DETERMINED UNDER THIS AGREEMENT	1
2004	STATUTORY	STATUTORY	3
2005	STATUTORY	STATUTORY	34
TOTAL LICENSES			5,192

APPENDIX C
MECHANICAL LICENSES EXCLUDED BASED ON CONTROLLED (BY CONFIGURATION)

Configuration Description	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
[NO CONFIGURATION DESCRIPTION]	-	647	-	-	19	26	-	-	-	-	-	692
07" VINYL (SINGLE)	227	75	81	59	42	44	28	32	17	4	2	611
12" VINYL (ALBUM)	681	559	541	664	566	902	782	662	704	839	370	7,270
12" VINYL (SINGLE)	205	262	189	213	211	324	206	112	166	88	41	2,017
AUDIO ONLY DIGITAL VIDEO DISC (DVD) (ALBUM)	-	-	-	-	755	2,298	2,011	1,476	33	9	-	6,582
AUDIO-ONLY DVD/CD HYBRID (2 SESSIONS) (ALBUM)	-	-	-	-	-	-	-	-	-	4	55	59
CASSETTE (ALBUM)	5,102	5,725	5,094	5,869	4,360	4,224	3,284	1,684	1,383	984	326	38,035
CASSETTE (SINGLE)	342	255	208	199	110	86	49	9	24	11	2	1,295
COMPACT DISC (ALBUM)	6,363	8,096	7,348	9,264	8,053	9,896	9,498	8,046	8,483	8,695	5,154	88,896
COMPACT DISC (SINGLE)	291	373	262	307	195	239	126	88	127	84	40	2,132
COMPUTER CHIP (SINGLE)	-	-	-	1	-	-	1	-	-	-	-	2
DIGITAL COMPACT CASSETTE (ALBUM)	1,566	1,636	1,432	2,674	1,706	2,547	2,107	1,790	2,007	1,444	569	19,478
DIGITAL PERMANENT DOWNLOAD (DPD) (ALBUM)	-	-	-	-	-	1,149	296	16	140	98	123	1,822
DIGITAL PERMANENT DOWNLOAD (DPD) (SINGLE)	-	-	-	-	-	-	1	-	-	50	40	91
LP (ALBUM)	8	81	104	67	133	289	95	122	56	37	2	994
MAXI-CASSETTE-SINGLE	18	35	-	29	3	4	4	-	-	-	-	93
MIDI (ALBUM)	-	-	-	-	1	-	-	-	-	-	-	1
MIDI (SINGLE)	-	-	-	2	3	-	-	-	-	-	-	5
MINI-CASSETTE	18	1	10	-	-	-	-	-	-	-	-	29
MINI-DISC (ALBUM)	1,570	1,634	1,425	2,675	1,708	2,568	2,118	1,790	2,010	1,452	552	19,502
OTHER	37	-	-	-	-	-	-	-	-	-	-	37
SINGLE	96	155	106	105	54	36	26	18	6	6	2	610
SUPER AUDIO CD/SUPER AUDIO CD (5.1 CHANNEL)/CD (ALBUM)(3 S	-	-	-	-	-	-	-	-	1	-	-	1
TOTAL CONFIGURATIONS	16,524	19,534	16,800	22,128	17,919	24,632	20,632	15,845	15,157	13,805	7,278	190,254

Appendix D

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Education

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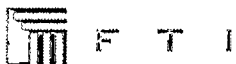
David Alfaro has extensive experience in dispute resolution including a specialization in complex, data-intensive analyses focused on class actions, government investigations, and bankruptcies. He has participated in many of the largest litigations, bankruptcy proceedings, and restructurings in the United States and within industries including financial services, manufacturing, government and higher education. Moreover, Mr. Alfaro has provided testimony in cases involving alleged breach of fiduciary obligation, fraud, RICO, and other similar events.

Prior to joining FTI, Mr. Alfaro was a director in KPMG's Forensic Dispute Advisory Services practice for nearly two years. Before that he spent nearly 10 years with Arthur Andersen, where he last served as a senior manager specializing in litigation support and complex data. Prior to joining Andersen, Mr. Alfaro was with Bank of America.

Professional Experience

Dispute Advisory Services (Select Cases)

- Recently provided testimony to the SEC regarding FTI's role as forensic consultants to the Independent Special Committee formed by the company's Board of Directors to investigate stock option practices. The testimony was used to support the criminal conviction of the stock option administrator.
- Supported the defense of a major financial institution against allegations of federal securities laws violations related to mutual funds and broker dealers.
- Supported the defense in three of the largest consumer class actions brought under California's Unfair Competition statute and other state statutes on behalf of thousands of beneficiaries of personal trusts administered by institutional trustees in California. The projected damages exceeded \$3 billion and arose from various claims focused on trust administration. The cases incorporated the consideration of hundreds of millions of transactional and paper records that were integral to the supporting analyses and class certification. Ultimately, the work that Mr. Alfaro and his team completed supported a trial victory in one of the cases and favorable settlements in the other two.
- Supported the defense of four major financial institutions in separate class action lawsuits related to interest rate calculations and other general calculation practices (e.g., impound amounts, escrow amounts, PMI, etc.), including, but not limited to, recalculating the distribution of each payment among the various aforementioned accounts.
- Supported the defense of two of the largest sub-prime lenders in separate class action lawsuits involving anti-competitive practices brought under the Fair Credit Reporting Act. Both matters included the analysis of over a hundred million records collected from each institution.
- Supported a leading global building supply company file for protection under Chapter 11 bankruptcy as a result of pending asbestos claims against it. The company included over 15 legal entities located across the country, many of which were supported by disparate financial systems such as SAP, JD Edwards, MAPICS, PRMS and EMS. Mr. Alfaro and his team



identified, extracted and synthesized the payable records of each system into a data warehouse used for several bankruptcy related analyses, including, but not limited to, the identification of unsecured creditors, preference payments, critical vendors and liability amounts. Mr. Alfaro also helped prepare the filing schedules and directed the design and development of the company's claims processing model.

- Currently engaged by the U.S. Department of Treasury and the Department of Justice in support of their defense of the largest civil class action lawsuit against the U.S. government, involving the alleged mismanagement of the Individual Indian Money trusts for over a 100-year period.

Other Experience

- Led a large engagement team tasked with recovering, inventorying and analyzing current and historic records; converting and synthesizing disparate electronic data forms (e.g., paper, microform and electronic records); reconstructing trusts and bond issues; developing inquiry-tracking systems; reviewing contracts and client account files (e.g., trust administration files, correspondence files, investment files, etc.); calculating historical federal and state tax liabilities; supporting class de-certification (e.g., demonstrating non-homogenous class characteristics); identifying and escheating unclaimed property; managing and resolving claimant inquiries; determining the disposition of after-discovered property due to deceased class members (i.e., estate reconstruction); disbursing refund checks; preparing, distributing and filing IRS Forms 1099. Mr. Alfaro was also responsible for summarizing the recovery procedures for court presentation and providing percipient witness testimony.
- Led an engagement team tasked with implementing statistical sampling, performing interest rate sensitivity analyses for various legal remedies, providing fact-based trial compilations, providing class notification, supporting expert witness testimony, developing document retrieval systems and organizing document productions.
- Led an engagement team tasked with recovering historical file server data from client archives, identifying relevant financial and accounting data files, converting transactional data to a UNIX-based SAS database, performing data normalization and standardization, conducting data mining techniques to support predictive modeling and implementing statistical sampling to verify data integrity. Mr. Alfaro was also responsible for summarizing the recovery procedures for court presentation and providing testimony.
- Led an engagement team tasked with reviewing government contracts, developing a contract administration database, reconciling contracts to job orders, reconciling contract amounts to billing tiers, tracking job status to deliverable dates and developing financial and accounting reports from the database model. Mr. Alfaro was also responsible for recovering historical accounting records for the purpose of statistical analysis.
- Led an engagement team tasked with sanitizing historical data ("data scrubbing"); converting, normalizing and standardizing electronic information; reconciling financials (purchasing, accounting and general ledger); determining data relationships and identifying and correcting information irregularities. Mr. Alfaro was also responsible for testing conversion processes and assuring data quality and integrity.
- Led an engagement team tasked with assisting the defendants develop their discovery and production plans, which included working closely with defendants' counsel in the development

of thorough processes and the implementation of those processes across all relevant areas of scope. This massive search, which considered billions of paper, microform and electronic records and took over a year to complete, exhausting tens of thousands of hours, concluded with Mr. Alfaro providing testimony on behalf of the defendants' motion for summary judgment.

Testimony Experience

SEC v. Vencent A. Donlan, Defendant, and Robin D. Colls Donlan, Relief Defendant, Civil Action No. 07 CV 793 JAH (LSP) (S.D. Cal.), declaratory and oral testimony to the SEC in support of their complaint against Vencent A. Donlan

Elouise Pepion Cobell, et al. v. Secretary of the Interior, et al., United States District Court for the District of Columbia, presentation testimony before the court appointed special master in support of Treasury's motion for summary judgment/deposition, trial testimony pending.

Carol Nickel, et al. v. Bank of America National Trust and Savings Association, United States District Court for the Northern District of California, declaratory and deposition testimony in support of defendant's motion for summary judgment.

Kimberly Fluty, As Private Attorney General v. Bank of America National Trust and Savings Association, Superior Court of the State of California, City and County of San Francisco, declaratory and deposition testimony in support of defendant's motion for summary adjudication.

FWHC Medical Group, Inc., et al. v. State Compensation Insurance Fund, et al., Superior Court of the State of California, County of Los Angeles, declaratory and deposition expert testimony in support of use of new statistical sample in plaintiffs' case.

Other Select Matters

Youngberg, et al. v. Bank of America National Trust and Savings Association, trial preparation and settlement compilations.

Stull, et al. v. Bank of America National Trust and Savings Association, trial preparation and settlement compilations.

Blosser, et al. v. Bank of America National Trust and Savings Association, trial preparation and settlement compilations.

Seaman, et al. v. Wells Fargo, trial preparation and settlement compilations.

Presentations

"Data Cleansing and Conversion," presenter at the NPMA 2000 National Educational Seminar, Reno, Nevada, June 2-8, 2000.

Employment History

FTI, Inc., managing director (2003-present)

KPMG, LLP, director (2002-2003)

Arthur Andersen, senior manager (1993-2002)

Bank of America, specialist (1991-1993)

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April 2008, I caused a true and correct copy of the foregoing **Corrected Testimony of David Alfaro** to be served upon the following by electronic mail and UPS overnight delivery:

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I further hereby certify that on the 25th day of April 2008, I caused a true and correct copy of the foregoing **Corrected Testimony of David Alfaro** to be served upon the following by electronic mail only:

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